Petition

81-530

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

SAM WILLIAM CHERNABAEFF,
Petitioner,

VS.

DAVID R. MOSS,
CHESTER ASHFORD AND RUBY TERRY ASHFORD
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

Can a bankruptcy court legally deny creditors (Respondents) or Bankrupt (Petitioner) a trial on the issue of dischargeability of creditor's claim under 11 U.S.C.A. (a)(4), when creditor has a State Court Judgment on the basis of 28 U.S.C.A. § 1738?

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PETITION FOR WRIT OF CERTIORARI
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Petitioner respectfully pray that a Writ of Certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding May 20, 1981, petition for rehearing denied August 10, 1981, affirming summary judgments against Petitioner, which had been entered by the United States District Court for the District of Oregon.

OPINION BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A. The Order denying Petition for rehearing is attached as Appendix B. The Opinions of the District Court and Bank-

ruptcy Court, regarding Respondent Moss, is attached as Appendix C, and regarding Respondents Ashford as Appendix D.

JURISDICTION

The Court of Appeals affirmed the Orders of the District Court on May 20, 1981, and denied Petitioners Petition for rehearing on August 10, 1981. Jurisdiction of this Court is invoked under 11 U.S.C.A. Section 47 (C).

STATUTES INVOLVED

Public Law 91-467, 91st Congressional Session (1970), 11 U.S.C.A. Section 523 (formerly 11 U.S.C.A. Section 35 [C][1][2]).

§ 523. Exceptions to Discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt.

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged,

the court shall grant judgment against such creditor and in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable.

STATEMENT OF THE CASE

A Petitioner filed a petition for discharge in bankruptcy including two (2) judgments entered against him in the Kern County Superior Court of the State of California. The Moss judgment was a judgment based on a judgment for fraud alleged to have been committed in the transaction wherein the bankrupt, in an attempt to consolidate his real estate holdings, had desired to trade a 160-acre tract of land further from his home place for a 160-acre tract of land closer to his home place, but in order to complete the transaction was induced by the realtor to trade his 160-acres for a bar, restaurant and buildings, which in turn were to be traded to the third party for the 160 acres desired. The bar, restaurant and buildings were owned by Moss and his unnamed associate. After bankrupt had entered into the trade for the bar, restaurant and buildings the third party refused to trade therefore, and bankrupt was unwilling to complete the trade as he was not in the bar and restaurant business but a farmer. Said judgment was for $34,865.24 dated February 16, 1979.

Hard pressed by other creditors upon the revoking of his farm financing operation, bankrupt agreed to sell a tract of land to the Respondent Ashford. There were numerous liens against the land, many of which bankrupt

felt were invalid as they were covered by other financing arrangements. Bankrupt agreed to remove the liens upon the sale to the Respondent Ashford. The Ashfords paid $50,000.00 upon the purchase of said property. Due to the pressure from other creditors, bankrupt shortly thereafter filed a Chapter 11 proceeding. He accounted in said bankruptcy court for the $50,000.00 he had received, but was thereafter sued by the Respondent Ashford for fraud in having failed to remove the liens upon the property which he had agreed to sell to the Ashfords and a judgment was entered in favor of the Ashfords and against bankrupt for the $50,000.00 down payment, which the Ashfords had made.

As both cases involved contracts which were breached due to change in circumstances, bankrupt contended that there was no fraud in either transaction and, call it what you will in the State Court to avoid discharge, they were nonetheless dischargeable in bankruptcy.

The Bankruptcy Judge denied discharge to bankrupt of said judgments erroneously treating them as the fact and law of the case. It based its findings upon those judgments without trial on the merits. The Court of Appeals confused the issue by intimating the judgments were the sole evidence of the judgments and not rebuttable.

Bankrupt was unlawfully denied a trial in the bankruptcy court and the case should be remanded for trial thereon, and a finding by the bankruptcy court upon the issues presented. Bankrupt's Chapter 11 Proceeding filed in 1967 resulted in his discharge in bankruptcy on Decem-

ber 8, 1970, and included the claims of both Respondents. Respondents made no application to the bankruptcy court to have their judgments non-dischargeable. There has been no other determination by the bankruptcy court in any other proceedings as to the dischargeability of the Respondents' judgments other than herein, nor has there been any trial on the merits in the bankruptcy court on this issue. Bankrupt is submitting that a hearing on a motion for summary judgment where the bankruptcy court determines the State Court judgments to be res adjudicata on those issues as the denial of the hearing on the merits.

REASONS FOR GRANTING THE WRIT

A. The intent of the Bankruptcy Act to give our citizens a chance to start over is being denied Petitioner through error of the lower court. This hinders his ability to provide for himself and family and amounts to economic imprisonment.

B. The decision of the Court of Appeals is contrary to the Bankruptcy Act and to the decision of this Court and the decision of other courts of appeals in other circuits.

The bankrupt, being in financial difficulty, was unable to adequately defend himself in the California State Proceedings, having rendered his assets subject to the jurisdiction of the Court in the Chapter 11 Proceedings. In order to avoid discharge, Respondents, Moss and Ashfords, converted breach of contract rights they may have had into fraud judgments. The bankruptcy court in these proceedings failed to recognize that the provisions of 11 U.S.C.A. 523 (a)(2) created a new cause of action in relation to

bankruptcy debts, giving the bankruptcy court sole jurisdiction on the issue of dischargeability. *Brown v. Felsen*, 99 S.Ct. 2205, 60 L.Ed.2d 767, 442 U.S. 127 (1979).

The Ninth Circuit Court of Appeals has recognized the foregoing authority in the case of *In re: Fulweiler*, 624 F.2d 909, (1980, Ninth Circuit); and the First and Tenth Circuits have followed the law in this regard, *Commonwealth of Massachusetts v. Hale*, 618 F.2d 143 (1980, First Circuit); *In re: Franklin, First National Bank of Albuquerque v. Franklin*, 615 F.2d 909 (1980, Tenth Circuit); Fifth Circuit—*Matter of Covington Grain Co., Inc.*, 638 F.2d 1357 (1980); *Key v. Wise*, 629 F.2d 1049 (1980).

In ruling the judgments of Respondents res adjudicata on the issue of dischargeability, the lower courts overlooked that the pleadings charged violations of contracts to perform acts in the future, Appendix E—Moss Complaint; Appendix F—Ashford's Complaint. A promise to do an act in the future cannot be the basis of a fraud action. *Webb v. Clark*, 274 Or. 387, 393 N.2d, 546 P.2d 1078; *Dyer v. Francis*, 152 Or. 448, 54 P.2d 297; *Dolth v. Lennon's Inc., et al.*, 109 Or. 336, 350, 225 P. 161. To permit a fraud judgment to be taken under these circumstances in the state court and become res adjudicata in a bankruptcy court is to perpetuate a fraud upon the courts, albeit willingly, in violation of the Bankruptcy Act. It is contrary to public policy and design to unlawfully hold a debtor in unlawful bondage.

CONCLUSION

The decision of the Court of Appeals should be reversed and the matter remanded to the bankruptcy court for trial on the merits on the question of dischargeability of the Respondent's judgments and a determination to abide such trial. State Court judgments should be held not to be res adjudicata on the issue of fraud in accordance with such Bankruptcy Act.

September 11, 1981.

GLENN D. RAMIREZ
Attorney for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit
No. 79-4697

In Re: Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts.
David R. Moss,
Appellee,
vs.
Sam William Chernabaeff, and Sally Chernabaeff,
Appellants

In Re: Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts.
Chester Ashford and Ruby Terry Ashford,
Appellees,
vs.
Sam William Chernabaeff, and Sally Chernabaeff,
Appellants

No. 79-4696
D.C. Nos. 77-01122/01123

Appeal from the United States District Court
for the District of Oregon
Robert C. Belloni, District Judge, Presiding
Argued and submitted May 8, 1981
Before: GOODWIN and KENNEDY, Circuit Judges, and
WATERS*, District Judge
[Filed May 20, 1981]

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

MEMORANDUM

The judgment of the district court affirming the findings of the bankruptcy court in each of the above numbered cases is affirmed. All factual and legal questions presented in the bankruptcy court were fully answered by the record in that court. The state court's findings of fraud are *res judicata* and cannot be re-litigated. The finding of fraud antecedent to the Moss judgment is not erased by the running of time and the renewal of the judgment did not extinguish any of the rights of the Moss creditors.

Affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit
No. 79-4697

In Re: Sam William Chernabaeff and Sally Chernabaeff, Bankrupts.

David R. Moss,
Appellee,
v.
Sam William Chernabaeff and Sally Chernabaeff,
Appellants

In Re: Sam William Chernabaeff and Sally Chernabaeff, Bankrupts.

Chester Ashford and Ruby Terry Ashford,
v.
Sam William Chernabaeff and Sally Chernabaeff,
Appellants.

No. 79-4696
DC Nos. 77-01122/011323

Before: GOODWIN and KENNEDY, Circuit Judges, and WATERS*, District Judge

[Filed Aug. 10, 1981]

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Kennedy vote to deny the suggestion for rehearing en banc and Judge Waters so recommends.

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

In the United States District Court
for the District of Oregon

In Bankruptcy
Nos. 77-01122 and 77-01123

Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts,

David R. Moss,
Plaintiff,
v.
Sam William Chernabaeff and Sally Chernabaeff,
Defendants.

OPINION

This matter comes before the Court pursuant to a motion by the bankrupts, Sam William Chernabaeff and Sally Chernabaeff (bankrupts), to amend their schedules to include a renewed judgment entered in favor of David R. Moss by the Superior Court of the State of California for Kern County, in case #96993. The bankrupts argue that although the original judgment was included in the schedules accompanying their original bankruptcy petitions, the judgment has since been renewed and the renewed judgment should be included in this proceeding.

On October 11, 1977, I found that the "claim in this proceeding based on the Judgment entered in the Superior Court of the State of California for Kern County in case #96993 is non-dischargeable pursuant to Section 17 of the Bankruptcy Act", *In the Matter of Chernabaeff*, Bankruptcy Nos. 77-01122 and 77-01123, at 4 (D. Or. October 11,

1977). Under California law, the Kern County Judgment would expire after ten years from its original entry. Therefore, plaintiff Moss had the judgment renewed in its entirety on February 14, 1979. The bankrupts argue that the renewal was based "strictly upon the former judgment without adjudication of fraud" (Bankrupt's Motion to Amend Schedules, pages 1-2) and therefore the claim should be discharged.

I will allow the motion to amend and include the renewed judgment in the schedules in this proceeding. I do not have discretion to disallow the amendment while the case is still open, as plaintiff urges. *In the Matter of Greenbaum*, 5 Bankr. Ct. Dec. 158 (3rd Cir. 1978). However, it does not follow that the debt is discharged upon its inclusion in the schedules. "[I]f a schedule is amended to include an additional creditor, the effect on the dischargeability of the creditor's claim is governed by the provisions of § 17 of the Act . . ." Advisory Committee's Note to Bankruptcy Rule 110. The question of discharge is a separate consideration from amendment of schedules.

As acknowledged by the bankrupts in their motion, I have already considered the question of dischargeability of the claim on which the renewed judgment is based. In making this determination, I did not determine that the judgment was discharged, but that the *claim* underlying it was based on fraud, and therefore, that the debt was not dischargeable in bankruptcy. I conducted an independent factual inquiry into the circumstances of the claim, as is appropriate under the Bankruptcy Act. I also considered the original judgment as evidence of the debt for purposes

of determining the amount of the claim. *In the Matter of Orsino*, 1 Bankr. Ct. Dec. 1187 (S.D.N.Y. 1975). *In the Matter of Brough*, 2 Bankr. Ct. Dec. 291 (W.D. Mich. 1976).

I have fully considered the question of dischargeability of the claim. It is not the purpose of this court in allowing the bankrupts to amend their schedules to force the plaintiff to relitigate this question. The doctrine of collateral estoppel precludes the redetermination of a fact issue which has been determined in a prior proceeding. *In the Matter of Brotherton*, 2 Bankr. Ct. Dec. 283 (Ore. 1975, Sullivan, J.). The renewal of the judgment does not change the nature of the underlying claim.

The bankrupts' motion to amend the schedules is allowed, and the claim based on the judgment entered in the Superior Court of the State of California for Kern County in the case #96993 as renewed on February 14, 1979 is not dischargeable in bankruptcy.

DATED this 29th day of June, 1979.

/s/ Michael R. Hogan
Bankruptcy Judge

In the United States District Court
for the District of Oregon

In Bankruptcy
Nos. 77-01122 and 77-01123

Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts,
David R. Moss,
Plaintiff,
vs.
Sam William Chernabaeff and Sally Chernabaeff,
Defendants.

[Filed Sept. 13, 1979]

ORDER

This is an appeal from the Bankruptcy Court. The bankruptcy judge granted defendants' motion to amend their schedules, and to include a renewed state court judgment in favor of plaintiffs against defendants. Defendants object to the finding that the debt is not discharged upon its inclusion in the schedules. Plaintiffs seek to recover reasonable attorneys' fees, claiming defendants' appeal is unfounded and vexatious.

Defendants' initial argument is that the renewed state court judgment was invalid because it did not redetermine the issue of fraud. The renewal of a judgment does not change the nature of the underlying claim. The bankruptcy judge found the original judgment was not dischargeable because of defendants' fraud. It follows that the renewal judgment is also not dischargeable. Defendants are collaterally estopped from relitigating the question. The argument is without merit.

Defendants' second argument is that the bankruptcy judge erred by not discharging the renewal judgment after allowing amendment of the schedules. This argument is also without merit. The dischargeability of an additional creditor's claim is independently determined by the provisions of section 17 of the Bankruptcy Act, 11 USC § 35. *See:* Advisory Committee's Note to Bankruptcy Rule 110. The bankruptcy judge found that the original state judgment was not dischargeable. It follows that the renewal judgment is also not dischargeable.

Defendants' discharge on December 8, 1970, was granted prior to the effective date of the 1970 amendment to the Bankruptcy Act. Therefore, defendants' reliance upon the applicability of the amendment to their case is incorrect. Defendants' third argument must also fail.

Finally, plaintiffs' request to recover reasonable attorneys' fees is denied.

The decision of the bankruptcy judge is affirmed. The appeal is dismissed.

Dated this 12 day of September, 1979.

/s/ ROBERT C. BELLONI
United States District Judge

United States District Court
for the District of Oregon

No. B 77-1122 and No. B 77-1123

Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts,

David R. Moss,
Plaintiff,

v.

Sam William Chernabaeff and Sally Chernabaeff,
Defendants.

[Filed Sept. 13, 1979]

JUDGMENT

The appeal is dismissed.

Dated: September 13, 1979.

/s/ ROBERT C. BELLONI
United States District Judge

Appendix D

United States District Court
for the District of Oregon

In Bankruptcy
Nos. 77-01122 & 77-01123

In Re Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts,
Chester Ashford and Ruby Terry Ashford,
Plaintiffs,
vs.
Sam William Chernabaeff and Sally Chernabaeff,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on Plaintiffs' Motion For Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and having heard oral argument, and having considered the Pre-trial Order, Plaintiffs' responses to Interrogatories propounded by Defendants/Bankrupts ("Defendants"), documents and affidavits filed in support of and in opposition to Plaintiffs' Motion For Summary Judgment, and the Findings of Fact and Conclusions of Law and Judgment entered after appearance made by Defendants and evidence was taken by the Kern County Superior Court, State of California, in Action No. 98987, which Findings of Fact and Conclusions of Law and Judgment are included as an exhibit to these Findings of Fact and Conclusions of Law, this Court finds the facts and states the conclusions of the law as follows:

FINDINGS OF FACT

1. On May 10, 1977 the Defendants filed their voluntary bankruptcy petition with the Court, listing therein a judgment obligation owing to Plaintiffs.

2. Plaintiffs filed an Application for Determination of Nondischargeability and for Entry of Judgment alleging the debt to be nondischargeable under the provisions of Section 17a of the Bankruptcy Act.

3. On November 21, 1972, the Kern County Superior Court, State of California issued Findings of Fact and Conclusions of Law and Judgment determining that the obligation owed by Defendants was nondischargeable in bankruptcy, and entered Judgment in favor of Plaintiffs against Defendants in the amount of $50,000 with interest thereon at the rate of 7% per annum from March 10, 1967.

4. The action filed by Plaintiffs in the Kern County Superior Court, State of California was based upon a Complaint filed April 21, 1967.

5. On April 4, 1967, Defendants had filed a Petition in Bankruptcy before the District Court of the United States for the Eastern District of California.

6. The proceedings before the Federal District Court, Eastern District of California resulted in discharge of the bankrupts on December 8, 1970.

7. With the discharge in bankruptcy, a Stay Order previously issued by the District Court for the Eastern District of California against the Plaintiffs herein, staying the State Court action, was lifted allowing Plaintiffs to proceed in the pending State Court action.

8. Defendants filed an appearance in the Kern County Superior Court, State of California action and with counsel defended against the claims set forth in Plaintiffs' Complaint including allegations of misrepresentation and fraud.

9. The Defendants did not appeal from the Kern County Superior Court, State of California Judgment rendered in favor of Plaintiffs and against Defendants. No attack was made on said Judgment in California. The Defendants did not seek to have the Bankruptcy Court in the California proceedings apply amended provisions of Section 17 of the Bankruptcy Act and to invoke the jurisdiction of the California Bankruptcy Court, which amendments provided for exclusive jurisdiction in the Bankruptcy Court to determine dischargeability of obligations in cases filed after the effective date of the amendment, December 1970, nor did the Plaintiffs, except for their petition for relief from the stay order.

10. The Kern County Superior Court, State of California had jurisdiction to litigate the Complaint of Plaintiffs in that it pre-dated the 1970 amendment to Section 17 of the Bankruptcy Act.

11. The Kern County Superior Court, State of California jurisdiction was exercised over the issue of non-dischargeability after an express lifting of an order staying the litigation in the California State Court by the California Bankruptcy Judge relating to the Petition in Bankruptcy filed in California.

12. The Kern County Superior Court judgment and its ruling that the obligation owing to Plaintiffs by Defendants

is not dischargeable is supported by the law and facts applicable to those proceedings.

CONCLUSIONS OF LAW

1. Plaintiffs' Application for Determination of Non-dischargeability for the Entry of Judgment is properly filed in this matter, and this Court has jurisdiction to determine the issues raised by said application.

2. Plaintiffs' Motion For Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is properly presented to the Court.

3. On November 21, 1972, the Kern County Superior Court, State of California in action number 98987, having jurisdiction of the Defendants and having jurisdiction of the issue of non-dischargeability, properly entered Judgment and Findings of Fact and Conclusions of Law establishing that Defendants owed Plaintiffs $50,000.00 upon a claim of misrepresentation and fraud, plus interest at the rate of 7% per annum from March 10, 1967.

4. The Defendants having filed a Petition in Bankruptcy before the Federal District Court, Eastern District of California cannot limit jurisdiction of the issue of non-dischargeability of the obligation owing Plaintiffs by virtue of an amendment to the Bankruptcy Act to Section 17a placing exclusive jurisdiction for determination of the issue of non-dischargeability in the Bankruptcy Court for all matters filed subsequent to December 1970. For all matters initiated prior to that date, there was concurrent jurisdiction, and the Kern County Superior Court, State of Cali-

fornia had jurisdiction of the issue as between Plaintiffs and Defendants.

5. The California Bankruptcy Court made an order allowing the Kern County Superior Court, State of California Court to proceed in the pending litigation. No appeal was taken, and said appeal should have been taken if they believed the Order was erroneous.

6. The documents filed by Plaintiffs relating to the California Superior Court action, and the affidavits and answers to interrogatories also provided by Plaintiffs support the Findings and Conclusions and Judgment entered by the California Court, and under the law applicable to the case then pending before it, said California Court had jurisdiction to enter said Findings and Conclusions and Judgment.

7. The Judgment and Findings of Fact and Conclusions of Law of the California Court are entitled to full faith and credit, and it is hereby concluded that the California Court's ruling that said obligation is not dischargeable is supported by the law and facts applicable to those proceedings and should not be disturbed by these proceedings before the District of Oregon.

IT IS SO ORDERED, and judgment shall be entered in accordance herewith.

DATED At Eugene, Oregon, this 22nd day of May, 1979.

C. E. LUCKEY
Bankruptcy Judge

In the United States District Court
for the District of Oregon

In Bankruptcy
Nos. 77-01122 and 77-01123

In Re Sam William Chernabaeff and Sally Chernabaeff,
Bankrupts,

Chester Ashford and Ruby Terry Ashford,
Plaintiffs,

vs.

Sam William Chernabaeff and Sally Chernabaeff,
Defendants.

[Filed Sept. 13, 1979]

ORDER

This is an appeal from the Bankruptcy Court. The bankruptcy judge granted plaintiffs' motion for summary judgment, and declared that their claim against defendants is nondischargeable. The subject of plaintiffs' claim against defendants is a fifty thousand dollar state court judgment, which arose out of a real estate transaction.

On appeal, defendants advance two arguments. First, that plaintiffs' state court judgments was discharged in December 1970. Second, that if the judgment was not discharged in 1970, the present court has the power and obligation to determine whether the state court judgment is dischargeable. The arguments are not persuasive.

With respect to the first argument, the state court had jurisdiction to address plaintiffs' complaint, because the action was initiated prior to the effective date of the 1970

amendment to the Bankruptcy Act, 11 USC § 35(c)(1)-(2). Therefore, the state court could properly determine the dischargeability of the debt which was the subject of plaintiffs' complaint. Further, the discharge granted defendants was also prior to the effective date of the amendment.

With respect to defendants' second contention, the bankruptcy judge correctly gave full faith and credit to the state court's findings and judgment.

For the foregoing reasons, and those presented by the bankruptcy judge, the decision is affirmed. Defendants' appeal is dismissed.

Dated this 12th day of September, 1979.

/s/ ROBERT C. BELLONI
United States District Court

Appendix E

In the Superior Court of the State of California
in and for the County of Kern

No. 96993

David R. Moss,
Plaintiff
vs.
Sam W. Chernabaeff, Sally Chernabaeff,
R. B. Rogers, also known as
Sandy Rogers, Doe I, Doe II and Doe III,
Defendants.

COMPLAINT

COMES NOW that the plaintiff and for a first cause of action complains and alleges against defendants, and each of them, as follows:

I.

That Doe I, Doe II and Doe III are sued herein by fictitious names in that the true names of said defendants are unknown to plaintiff but at such time as said true names are ascertained, plaintiff will ask leave of court to amend this complaint and insert said true names.

II.

That prior to the filing of this law suit, by written assignment, Allen H. McFarland did assign to the plaintiff all of his right, title and interest in and to the cause of action but out [sic] herein for purposes of collection and litigation.

III.

That on or about the 15th day of June, 1966 the defendants Sam W. Chernabaeff and Sally Chernabaeff were and now are seized in fee simple certain real property described in the Agreement hereinafter mentioned.

IV.

That on the 13th day of June 1966 the plaintiff and defendants entered into an agreement in writing whereby plaintiff agreed to buy by an exchange of certain other real property and the defendant agreed to sell the property described in the agreement, a copy of which is attached hereto as Exhibit "A" and incorporated herein as though fully set out at length. That the consideration named in the aforesaid agreement is a fair and reasonable value of said property.

V.

That plaintiff has duly performed all of the conditions of the agreement on his part to be performed precedent to the conveyance of said property and has demanded the conveyance of said property.

VI.

Defendants have refused and still refuse to complete said conveyance and complete said escrow.

COMES NOW THE PLAINTIFF AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, ALLEGES OF DEFENDANTS, AND ALL OF THEM, AS FOLLOWS:

I.

Plaintiff herein realleges paragraphs I, II, III and IV of the First Cause of Action with the same force and

effect as though fully set out herein at length in this cause of action.

II.

That at all times herein mention the defendant R. B. Rogers, also known as Sandy Rogers, was and now is a partner in the operation of the business known as the Jasmine Tree and Jasmine Inn with the defendants Sam W. Chernabaeff and Sally Chernabaeff.

III.

That the defendants, pursuant to the written escrow instructions which is attached to this complaint as Exhibit "A", did enter into and take possession of the Jasmine Tree and Jasmine Inn and have operated, maintained and controlled the aforesaid premises from and after June 15, 1966 and have received all profits and moneys flowing forth from said business operations.

IV.

That at various times and divers occasions from June 15, 1966 until this date each and every one of the defendants have falsely and fraudulently represented to the plaintiff that they would sell and exchange the real property described in the attached Exhibit "A" herein for the business commecially known and referred to as the Jasmine Tree and Jasmine Inn.

V.

That the defendants on the aforesaid occasions further represented that if possession of said premises would forthwith be delivered to them upon the opening of escrow so that they could operate manage and control and take

forth the profits of said business, that the escrow referred to in Exhibit "A" would be closed as expeditiously as possible.

VI.

That the plaintiff, believing the false and fraudulent representations of the defendants, that they were in good faith and were in fact going to properly and promptly close said escrow and exchange the property referred to, did turn over the operation, management and control of a going and profitable business to the defendants herein and the defendants did maintain, control and operate said Jasmine Tree and Jasmine Inn from and after June 15, 1966 to date and are still operating, maintaining and controlling and taking all profits from the aforesaid business.

VII.

That the defendants, when they made the aforesaid representations, knew them to be false and, as a matter of fact, the defendants at no time had any intentions of completing said sale but were merely going into possession of the aforesaid Jasmine Tree and Jasmine Inn for the purpose of taking all profits from the business and not paying any of the obligations or liabilities and that they have since so destroyed the good will and depleted the assets of the business so as to totally and solely destroy it for any useful purpose.

VIII.

That the Jasmine Tree and the Jasmine Inn had been so mismanaged during the approximately three months period that the defendants have wholly and totally destroyed

it as a going business which it was at the time that possession of it was delivered to the defendants herein at their special instance and request.

IX.

That the defendants knew at the time they made the aforesaid representations that they were false and that all of the aforesaid representations ultimately were made and actions done with intent to defraud and deceive the plaintiff and induce him to act in the manner herein alleged.

X.

That had plaintiff at the time of said representations known of all their falsity he would not have relied upon them, and he would not have entered into the sale of said business.

XI.

That by reason of the acts and statements of the defendants aforesaid, the plaintiff has been damaged in the sum of $100,000.00.

XII.

That in doing the things herein alleged, the defendants acted maliciously and were guilty of a wanton disregard of the rights, feelings and credit reputation of the plaintiff, and by reason thereof plaintiff demands exemplary and punitive damages against the defendants in the sum of $100,000.00.

COMES NOW THE PLAINTIFF AND FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, ALLEGES OF DEFENDANTS, AND ALL OF THEM, AS FOLLOWS:

I.

Plaintiff herein realleges paragraphs I, II, III and IV of the First Cause of Action and paragraph II of the Second Cause of Action with the same force and effect as though fully set out herein at length in this cause of action.

II.

That on the 13th day of June, 1966, at Bakersfield, California, plaintiff and the defendants entered into a written contract, a copy of which is attached hereto and marked Exhibit "A" as referred to in the first cause of action.

III.

That plaintiff has performed all of the conditions, covenants and promises and conditions of the contract on his part to be performed.

IV.

That on or about the 1st day of July, 1966, the defendants breached the contract by refusing to fill out the necessary and various documents required to complete said contract, to wit: Exhibit "A".

V.

That as a result of the said breach of said contract the plaintiff has been damaged in the sum of $100,000.00.

WHEREFORE, plaintiff prays for judgment against the defendants, and each of them as follows:

1. That the defendants be required to execute a full conveyance in conformance with the terms of Exhibit "A" attached hereto.

2. That in the alternative if said conveyance can not be had in the terms set out therein, that damages in the sum of $100,000.00 be granted to the plaintiff and against the defendants.

3. That plaintiff have exemplary and punitive damages in the sum of $100,000.00.

4. For costs of suit and for such other and further relief as may appear proper in the premises.

VIZZARD, BAKER, SULLIVAN
& McFARLAND

By /s/ ALLAN H. McFARLAND
Attorneys for Plaintiff

Appendix F

Superior Court of the State of California
for the County of Kern

No. 93987

Chester Ashford and Ruby Terry Ashford,
husband and wife,
Plaintiffs,
vs.
Sam Chernabaeff and Sally Chernabaeff,
individually; and Sam Chernabaeff and
Sally Chernabaeff doing business as Black Company,
a copartnership; Green Company, a corporation;
Yellow Company, a copartnership; Doe I and Doe II,
Defendants.

COMPLAINT

Come now the plaintiffs above named and complain of the defendants and each of them and for cause of action allege:

I

At all times herein mentioned the plaintiffs were and now are husband and wife.

II

That the defendants sued herein under the fictitious names of Black Company, a copartnership, Green Company, a corporation, Yellow Company, a copartnership, Doe I and Doe II are so sued because plaintiffs do not know their true names, but when the same have been ascertained plaintiffs will ask leave of the Court to amend this complaint and insert the same herein; that the defendant Green Company was at all times herein mentioned a duly

organized and existing corporation under and by virtue of the laws of the State of California.

III

That at all times herein mentioned the defendants Sam Chernabaeff and Sally Chernabaeff were and now are residents of the County of Kern, State of California.

IV

That at all times herein mentioned the defendants Sam Chernabaeff and Sally Chernabaeff were acting as the agents of the other defendants herein, within the course and scope of their agency.

V

On the 10th day of March, 1967, plaintiffs as buyers and the defendants Sam Chernabaeff and Sally Chernabaeff as sellers, in the County of Kern, State of California, signed and executed written escrow instructions (misdated March 9, 1967) for the purchase and sale of certain improved farm land, consisting of approximately 360 acres located in the County of Kern, a true and correct copy of which is attached hereto and incorporated herein by reference.

On the 10th day of March, 1967, plaintiffs paid $50,000.00 cash directly to the defendants Sam Chernabaeff and Sally Chernabaeff.

VI

The promises of performance of said escrow instructions made by the defendants Sam Chernabaeff and Sally Chernabaeff, with the knowledge and consent of the other defendants, were willfully, deceitfully and falsely made and made without any intention on their part of perform-

ing the same and were made for the purpose of inducing plaintiffs to enter into said escrow instructions and to pay to the defendants directly the sum of $50,000.00 cash outside of escrow, in that the said defendants at the time of making and entering into the same were in fact insolvent and bankrupt and unable to perform the conditions thereof and the promises therein; that the said real estate had deeds of trust, financing statements, judgment liens, tax liens and other liens against the title thereof far in excess of the purchase price; that the said sellers well knew at said time that they could not and had no intention of performing the said promises and conditions; the sellers were in fact insolvent, and on or about April 4, 1967 filed proceedings under Chapter XI of the Act of Congress relating to bankruptcy in the United States District Court, Eastern District of California, in proceedings No. F-1236-BKY; that the time for performance of said escrow instructions has expired and the defendants have not made any effort to perform the same and in fact have caused additional liens to be placed against said property since the opening of the escrow and the defendants are unable to return the $50,000,000 cash paid outside of escrow and the said escrow agreement has been rescinded; the rent for the years 1968 and 1969 under the farm lease dated January 12, 1961 had been in fact paid to the sellers, although part of the provisions of said escrow were to the effect that the rent for the year 1967 only was to be paid to the sellers.

VII

That at all times during the time for performance of said escrow instructions plaintiffs were ready, willing and

able to perform all of the terms, conditions and promises on their part required to be performed.

VIII

That the plaintiffs believed in good faith that the defendants intended to perform the provisions of said contract and signed and executed the same and paid the defendants the $50,000.00 outside of escrow in reliance upon defendants' promise to perform.

IX

By reason of the facts aforesaid and as a direct and proximate result of said fraudulent and deceitful conduct, plaintiffs have been damaged in the sum of $50,000.00, together with interest at 7 per cent per annum from March 10, 1967.

X

In doing the things herein alleged, defendants acted maliciously and willfully and were guilty of a wanton disregard of the rights of plaintiffs and by reason thereof plaintiffs demand exemplary and punitive damages in the sum of $50,000.00.

FOR A FURTHER, SEPARATE AND DISTINCT CAUSE OF ACTION, plaintiffs complain of the defendants and each of them and for cause of action allege:

I

Plaintiffs replead and reallege all of the allegations contained in paragraphs I through IV of the first cause of action and incorporate the same herein by reference as if fully set forth at this place.

II

Within two years last past in the County of Kern, State of California, the defendants became indebted to the plaintiffs in the sum of $50,000.00 for money paid, laid out and expended for the defendants at the defendants' instance and request.

III

That no part of said sum has been paid to the plaintiffs, although payment has been demanded, and there is now due, owing and unpaid to the plaintiffs from the defendants the sum of $50,000.00, together with interest thereon at the legal rate from the 10th day of March, 1967.

FOR A FURTHER, SEPARATE AND DISTINCT CAUSE OF ACTION, plaintiffs complain of the defendants and each of them and for cause of action allege:

I

Plaintiffs replead and reallege all of the allegations contained in paragraphs I through IV of the first cause of action and incorporate the same herein by reference as if fully set forth at this place.

II

That within two years last past in the County of Kern, State of California, the plaintiffs paid and delivered to the defendants the sum of $50,000.00 and the defendants received the same and hold said money for the use and benefit of the plaintiffs.

III

That the plaintiffs have demanded from the defendants the payment of said sum, but the defendants refused and

still refuse to pay the plaintiffs aid sum or any part thereof, and there is now due, owing and unpaid from the defendants to the plaintiffs the sum of $50,000.00, with interest at the legal rate from March 10, 1967.

WHEREFORE, the plaintiffs pray judgment against the defendants and each of them upon the first cause of action for compensatory damages in the sum of $50,000.00 and for punitive and exemplary damages the sum of $50,000.00, all with interest at 7 per cent per annum from the 10th of March, 1967; and upon the second and third causes of action for judgment in the sum of $50,000.00, together with interest thereon from March 10, 1967, for costs of suit and for such other and further relief as to the Court may seem proper in the premises.

BORTON, PETRINI, CONRON
& BROWN

By GEORGE A. BROWN
Attorneys for Plaintiffs.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-530

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

SAM WILLIAM CHERNABAEFF,
Petitioner,

vs.

DAVID R. MOSS
CHESTER ASHFORD AND RUBY TERRY ASHFORD
Respondents

ON PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Brief In Opposition To Petition For
Writ of Certiorari on behalf of
Respondents,
CHESTER ASHFORD AND RUBY TERRY ASHFORD

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TABLE OF AUTHORITIES CITED

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QUESTIONS PRESENTED

Are the Findings of Fact and Conclusions of Law, and Judgment thereon, entered by a Superior Court of California, on a Complaint filed April 21, 1967, wherein the Superior Court determined that the obligation, owing from Petitioner to Respondent herein, was non-dischargeable in a bankruptcy proceeding filed by Petitioner prior to December 19, 1970, entitled to *res judicata* effect and full faith and credit in a subsequent bankruptcy proceeding filed after December 19, 1970, said date being the effective date of Public Law 91-467 giving exclusive jurisdiction to the Bankruptcy Court to determine the issue of nondischargeability of an obligation under then 11 U.S.C.A. Section 35?

No. 81-530

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

SAM WILLIAM CHERNABAEFF,
Petitioner,

VS.

DAVID R. MOSS
CHESTER ASHFORD AND RUBY TERRY ASHFORD
Respondents.

Brief In Opposition To Petition For Writ of Certiorari on behalf of
Respondents,
CHESTER ASHFORD AND RUBY TERRY ASHFORD

OPINIONS BELOW

(Not Otherwise Contained In The Petition)

The Findings of Fact and Conclusions of Law of The Superior Court, in and for the County of Kerm State of California is attached as Appendix "A".

The Judgment of the Superior Court, in and for the County of Kern, State of California is attached as Appendix "B".

STATEMENT OF THE CASE

This matter is before this Court on the Petition For Writ of Certiorari to the United States Ninth Circuit Court of Appeals, which Court affirmed the judgment of United States District Court for the District of Oregon affirming the judgment of that District's Bankruptcy Court in favor of Respondents, and dismissing that appeal. The Bankruptcy Court issued its Order For Summary Judgment and Judgment in favor of Respondents determining that a State Court judgment obtained by Respondents against the Petitioner in 1972, wherein the State Court determined that the obligation owing the

Respondents had not been discharged in a prior bankruptcy proceeding, the Petition for which was filed April 4, 1967, and was nondischargeable, was entitled to full faith and credit, and said judgment was not to be disturbed, and confirmed that the Petitioner owed the Respondents $50,000.00 plus interest at the rate of 7% (seven percent) per annum from March 10, 1967.

The gravest error of ommission in the Petition for Writ of Certiorari submitted on behalf of Petitioner, is the failure to even mention the bankruptcy proceeding in the Federal District Court, Eastern District of California, the Petition for which was filed on April 4, 1967. The order removing stay order issued by that Court which allowed the Respondents to pursue their State Court action in which it was determined that the obligation owing to the Respondents was nondischargeable, is attached hereto as Appendix "C".

The State Court complaint commencing the action in the Superior Court of the State of California in and for the County of Kern, filed on behalf of Respondents is attached to the Petition as Appendix "F". The Findings of Fact and Conclusions of Law and Judgment thereon issued by the Kern County Superior Court are attached hereto as Appendices "A" and "B", respectfully.

With regard to the State Court action, Petitioner appeared and defended against the complaint on the merits, including the allegations contained in the complaint of misrepresentation and fraud. The answer filed on behalf of Petitioner is attached hereto as Appendix "D".

Petitioner did not appeal from the California State Superior Court judgment, and the period for perfecting that appeal has long since expired.

Subsequently, on May 11, 1977, the Petitioner filed a second voluntary bankruptcy petition with the United States District Court for the District of Oregon, listing the judgment obligation owing to the Respondents. The Respondents duly filed applications for determination of nondischargeability under the provisions of Section 17(a) of the Bankruptcy Act.

The respondents thereafter made a Motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Motion was granted by Bankruptcy Judge Luckey by Order dated May 22, 1979, a copy of which is attached hereto as Appendix "E". Judge Luckey further adjudged that the claim of the Respondents against Petitioner

was nondischargeable in the Bankruptcy Court and the Findings of Fact and Conclusions of Law and Judgment entered in the Kern County Superior Court, State of California, were supported by the evidence taken by the Kern County Superior Court and that that Court had jurisdiction to determine that the obligation sued upon by the Respondents was nondischargeable in bankruptcy. Judge Luckey further found no basis for interfering with the Kern County Superior Court judgment and gave full credit to the Findings of Fact and Conclusions of Law and Judgment entered in that Court.

ARGUMENT

A. *The Respondent's Judgment Was Not Discharged In December of 1970.*

The Petitioner contends below, erroneously, that the Respondent's judgment was discharged by the Bankruptcy Court, Eastern District of California in December of 1970. This argument is founded upon the erroneous application of the amendment to Section 17 of the Bankruptcy Act (Title 11, U.S.C.A. §35) enacted in 1970 to the bankruptcy proceedings in the Eastern District of California which resulted in the discharge of other obligations of Petitioner's granted December 8, 1970.

Public Law 91-467, 91st Congressional Session (1970), amended Section 17 by adding subdivision c, which provided a procedure for either a creditor or debtor to apply for a determination of the dischargeability of a particular debt in the Bankruptcy Court. [Title 11, U.S.C.A. §35(c) (1)]. It further provided that a creditor who contended his debt was nondischargeable because it had been obtained by false pretenses or misrepresentation must apply for such a determination by the Bankruptcy Court. [Title 11 U.S.C.A. §35(c) (2)]. Failure to file for such a determination in a timely manner results in an automatic discharge of the debt.

Public Law 91-467 was approved on October 19, 1970, and included the following:

> "The provisions of this amendatory act shall take effect on or after 60 days from the date of its approval and shall govern proceedings in all cases filed after such date."

The effective date of the amendment was December 19, 1970.

The defendants petition for Chapter XI proceedings was filed April 4, 1967. The proceedings were thereafter changed to bankruptcy proceedings, and the discharge was granted on December 8, 1970. Both events preceded the effective date of the 1970 amendments. Defendants contend, nevertheless, that the amendment somehow operated to infer exclusive jurisdiction on the issue of dischargeability to the Bankruptcy Court, and that plaintiffs' claim was discharged for failure to apply to the Bankruptcy Court for a determination of non-dischargeability. No authority is cited for these contentions which are patently contrary to the provision of Public Law 91-467. The authorities cited in support of the petition are all cases arising since the amendment on issues arising after the amendment. No case cited by petitioner is on point or supports the Petition.

B. *The Kern County Superior Court Had Jurisdiction Of Both The Parties And The Subject Matter To Determine The Issue Of Dischargeability*

Before the 1970 amendments to Section 17 of the Bankruptcy Act, the Bankruptcy Court determined the right to a discharge, but not its affect on any particular debt. [*Matter of Lowe* 36 F.Supp. 772 (W.D. Ky. 1941); *Matter of Anthony* 42 F.Supp. 312 (E.D. 111 1941)]. The general rule was that the Court in which the debt was being litigated was the proper forum in which to determine whether a discharge released a particular debt. [*Collier On Bankruptcy* (14th ed.) Vol. 1A, paragraph 17.28, page 1725]. In fact, the determination of dischargeability was invariably decided in a state court in which the debtor raised the discharge as an affirmative defense. [*Coen vs. Zick* 48 F.2d 326 (9th Cir. 1972; *In re Zitzman* 46 F.Supp. 314 (D.C. N.Y. 1942), *In re McCarthy* 45 F.Supp. 323 (D.C. N.Y. 1942); *Ruegsegger vs. McCarley*, 262 Ore. 157, 496 P.2d 214 (1972)]. Any court with the jurisdiction of the subject matter and the parties could determine the issue. [*Otte vs. Cooks, Inc.* 113 F.Supp. 861 (D.C. Minn. 1953)].

Because the 1970 amendments to Section 17 of the Bankruptcy Act did not apply to the proceedings in the United States District Court for the Eastern District of California, the Respondents were not obliged to request a determination of dischargeability in the Bankruptcy Court, nor did the discharge granted on December 8, 1970, result in an automatic discharge of their claim for failure to do so. The California

Bankruptcy Court, in lifting the stay previously imposed on the action in the Kern County, California Superior Court, was following the established practice of leaving the affect of the discharge on that particular debt to a State Court determination; otherwise, the stay would have been left permanently in effect.

In addition to jurisdiction of the subject matter, as shown by the authorities previously cited, the Kern County Superior Court had jurisdiction of the parties. The Petitioner personally appeared in the State Court by way of answer to the complaint, and pursued the matter to a judgment on the merits. The dischargeability of the Respondents' claim was specifically litigated in the State Court action, and in the judgment rendered on November 21, 1972, the Superior Court Judge found that the debt owed by the Petitioner to the Respondents was not dischargeable in bankruptcy. The Findings of Fact and Conclusions of Law, and Judgment of the Kern County Superior Court Judge were appended to the Bankruptcy Judge's Findings of Fact and Conclusions of Law. Following the judgment entered against him, the Petitioner failed to perfect an appeal to a higher State Court directly contesting the correctness of the Kern County Superior Court Judgment.

C. *The Principals of Res Judicata, Full Faith and Credit and Collateral Estoppel Preclude Defendents From Relitigating The Dischargeability of Plaintiffs' Claim In The New Bankruptcy Proceeding In 1977*

The rule was well settled prior to the enactment of Public Law 91-467 that once the effect of a discharge is litigated in a State Court, the Judgment of the State Court is *res judicata* and not subject to a collateral attack in Bankruptcy Court. [*Heiser vs. Woodruff* 327 U.S. 726, 66 S. Ct. 853 (1946); *White vs. Public Loan Corporation* 247 F.2d 601 (8th Cir. 1957); *Prebyl vs. Prudential Insurance Co.* 98 F.2d 199 (8th Cir. 1938); *In re Marshall* 24 F.Supp. 1012 (D.C. N.Y. 1938)1.]

CONCLUSION

Petitioner does not present any ground for review as required by Rules of the Supreme Court of the United States, Rule 17. The Petition should be summarily denied.

Respectfully submitted,

Kenneth Michael Byrum
BYRUM, KIMBALL & LANIER

Sidney P. Chapin
WERDEL & CHAPIN

Appendix A

Superior Court of The State Of California
For the County of Kern
No. 98987

Chester Ashford and Ruby Terry Ashford, husband and wife
Plaintiffs,

vs.

Sam Chernabaeff and Sally Chernabaeff, etc., et al.
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial before the Honorable Marvin E. Ferguson, Judge of the Superior Court, sitting without a jury in Department Four of the above entitled Court on May 30, 1972. Plaintiffs appeared by Borton, Petrini, Conron, Wetteroth, Hitchcock, Werdel & Kuhs, by Sidney P. Chapin, their attorneys, and defendents appeared by Daly & Keon, by James F. Keon, their attorneys, and evidence both oral and documentary, having been introduced and the issues having been argued and submitted, the Court, after due consideration, and having rendered its decision that judgment should be entered in favor of plaintiffs, Chester Ashford and Ruby Terry Ashford, and against the defendents, Sam Chernabaeff and Sally Chernabaeff, now makes the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. Plaintiffs were on March 10, 1967, and are husband and wife.

2. Defendents Sam Chernabaeff and Sally Chernabaeff were residents of the County of Kern, State of California on March 10, 1967.

3. Plaintiffs as buyers and defendents as sellers, on the 10th day of March 1967, signed and executed written Escrow Instructions (misdated March 9, 1967) for the purchase and sale of certain improved farm land, consisting of approximately 360 acres located in the County of Kern. A copy of said Escrow Instructions including a description of said land is attached

hereto as Exhibit "A".

4. Plaintiffs on the 10th day of March, 1967, paid $50,000.00 cash through aforesaid Escrow directly to defendents, Sam Chernabaeff and Sally Chernabaeff, prior to the close of said Escrow.

5. On March 10, 1967, and prior to payment of the sum of $50,000.00 as set forth in Findings of Fact No. 4 above, defendsants, Sam Chernabaeff and Sally Chernabaeff, orally represented and promised to plaintiffs that said Escrow Instructions would be carried out as drafted and that the Escrow established would close under the terms of said Escrow Instructions.

6. The Escrow Instructions indicated title vested in Chester Ashford and Ruby Terry Ashford, husband and wife, as community property subject only to:

(1) General and special taxes for the fiscal year 1967-1968.

(2) Covenants, conditions, restrictions and easements of records.

(3) A Farm Lease recorded January 12, 1961 in Book 3338, Page 146 of Official Records. Seller retains 1967 lease money.

(4) Deed of Trust in favor of Northwestern Mutual Life Insurance Company recorded February 9, 1962, in Book 3461, Page 714 of Official Records, and having an approximate unpaid balance of $129,600.00.

7. At the time defendants made the representations and promises set forth in Findings of Fact No. 5, they had no intention of conveying title to the subject land to plaintiffs free of all liens and encumbrances except those specified in the Escrow Instructions.

8. At the time defendants made the representations and promises set forth in Findings of Fact No. 5, they had no reasonable basis for believing they could convey title to the subject land to plaintiffs free of all liens and encumbrances except those specified in the Escrow Instructions.

9. Said false representations of defendants concerning their performance of the Escrow Instructions were made for the purpose of inducing plaintiffs (1) to enter into said Escrow Instructions and (2) to pay directly to defendants through said Escrow the sum of $50,000.00 cash in advance of the close of Escrow.

10. The real estate which was the subject of said Escrow

Instructions had deeds of trust, financing statements, judgment liens, tax liens and other liens against the title thereof as indicated in the preliminary title report attached hereto as Exhibit "B", which liens were in excess of the liens and encumbrances plaintiffs agreed to accept under the Escrow Instructions in the recorded amount of $2,204,541.49.

11. The defendants knew at the time of executing said Escrow Instructions and receiving aforesaid sum of $50,000.00 that they could not perform their obligations set forth in the Escrow Instructions to convey title to plaintiffs subject only to the liens and encumbrances specified therein.

12. The time for performance of said Escrow Instructions expired, and defendants made no effort to perform their obligations thereunder, either before or after expiration of said time for performance.

13. After the time for performance of defendants' obligations under the aforesaid Escrow Instructions had expired, defendants failed and refused after demand by plaintiffs to return the $50,000.00 cash paid through Escrow, and the Escrow agreement was rescinded by plaintiffs.

14. Plaintiffs were at all times during said Escrow willing and able to perform all of the terms, conditions and promises on their part required to be performed thereunder.

15. Plaintiffs believed in good faith that defendants intended to perform all of the provisions of said Escrow Instructions required of them to be performed; plaintiffs signed and executed the same and paid defendants the sum of $50,000.00 in advance of the close of Escrow in reliance upon defendants' provises to perform as aforesaid.

16. The $50,000.00 paid by plaintiffs to Sam Chernabaeff and Sally Chernabaeff in reliance on the misrepresentations of defendants was the community property of plaintiffs.

17. Plaintiffs have been damaged in the sum of $50,000.00, plus interest thereon at the rate of seven (7%) per cent per annum from March 10, 1967 and costs of suit herein.

18. The issue of defendants' liability to plaintiffs on the debt of $50,000.00 was not litigated in the Bankruptcy Court of the Federal District Court, Eastern District of California.

19. The debt owned by defendents to plaintiffs of $50,000.00 is a debt which is not dischargeable in bankruptcy.

CONCLUSIONS OF LAW

1. The issue of defendants' liability to plaintiffs not having been litigated in the Bankruptcy Court of the Federal District Court, Eastern District of California, this Court has jurisdiction of the parties to and the subject matter of this action.

2. The debt owed by defendants to plaintiffs being nondischargeable in bankruptcy, this Court has jurisdiction of the parties to and the subject matter of this action.

3. Plaintiffs and defendants, on the 10th day of March, 1967, signed and executed written Escrow Instructions for the purchase and sale of the land described in Exhibit "A", under the terms of which defendants agreed to convey the subject land free of all liens and encumbrances except those specified in the Escrow Instructions.

4. In addition to the written representations of the Escrow Instructions, defendants, on March 10, 1967, orally represented and promised to plaintiffs that said Escrow Instructions would be carried out as drafted, and that the Escrow established would close under the terms of said Escrow Instructions.

5. Defendants made the promises and representations referred to in Conclusions No. 2 and 3 for the purpose of inducing plaintiffs to pay to defendants $50,000.00 through said Escrow in advance of the close of said Escrow.

6. At the time defendants made the representations and promises set forth in Conclusions No. 2 and 3, they had no intention of conveying title to the subject land to plaintiffs free of all liens and encumbrances except those specified in the Escrow Instructions.

7. At the time defendants made the representations and promises set forth in Conclusions No. 2 and 3, they had to reasonable basis for believing they could convey title to the subject land to plaintiffs free of all liens and encumbrances except those specified in the Escrow Instructions.

8. Plaintiffs, reasonably relying upon the false representations and false promises of defendants were induced to pay to defendants $50,000.00 through Escrow and in advance of the close of Escrow.

9. Plaintiffs reasonable reliance upon the false representations and promises of defendants proximately caused plaintiffs to loose said $50.000.00 and to sustain damage in that amount.

10. The sum which will compensate plaintiffs for all of the detriment proximately caused by defendants' false representations and false promises is $50,000.00 plus interest at the rate of seven (7%) per cent per annum from March 10, 1967, and costs of suit herein.

DATED: November 21, 1972

Judge of the Superior Court

/s/ Marvin E. Ferguson

Appendix B

Superior Court of the State of California
For the County of Kern
No. 98987

Chester Ashford and Ruby Terry Ashford, husband and wife,
Plaintiffs,

vs.

Sam Chernabaeff and Sally Chernabaeff, etc., et al.,
Defendants

JUDGMENT

The above entitled cause came on regularly for trial before the Honorable Marvin E. Ferguson, Judge of the Superior Court, sitting without a jury in Department Four of the above entitled Court on May 30, 1972. Plaintiffs appeared by Borton, Petrini, Conron, Wetteroth, Hitchcock, Werdel & Kuhs, by Sidney P. Chapin, their attorneys, and defendants appeared by Daly & Keon by James F. Keon, their attorneys, and evidence both oral and documentary, having been introduced and the issues having been argued and submitted, the Court, after due consideration, having rendered its decision in favor of the plaintiffs and having made and filed its findings of Fact and Conclusions of Law,

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs, Chester Ashford and Ruby Terry Ashford, have judgment against defendants, Sam Chernabaeff and Sally Chernabaeff, in the sum of $50,000.00 together with interest thereon at the rate of seven (7%) per cent per annum from March 10, 1967, in the amount of _____ together with costs and disbursements in the amount of _____ _____.

DATED: November 21, 1972

Judge of the Superior Court

/s/ Marvin E. Ferguson

Superior Court of California,
County of Kern

Superior Court of California, County of Kern
1415 Truxtun Avenue, Bakersfield, California 93301

CLERKS CERTIFICATE

State of California, County of Kern

I, Vera K. Gibson, County Clerk of the County of Kern, State of California, and ex Officio Clerk of the Superior Court of said County of Kern, State of California, hereby certify that the foregoing is a full, true and correct copy of the Judgment and Findings of Fact and Conclusions of Law in the matter of Chester Ashford and Ruby Terry Ashford, husband and wife, Plaintiffs, vs. Sam Chernabaeff and Sally Chernabaeff, Defendants, being Case No. 98987, Superior Court of California, County of Kern, the same geing of record in my office.

IN TESTIMONY WHEREOF, Witness my hand and seal of my office in the County of Kern, State of California, this 27th day of September, 1978.

/s/ Vera K. Gibson
County Clerk and ex Officio
Clerk of Superior Court

CERTIFICATE OF JUDGE

State of California, County of Kern

In, Marvin E. Ferguson, Judge of the Superior Court of the County of Kern, State of California, do certify that Vera K. Gibson, by whom the annexed certificate and attestation were given, and who in her own proper handwriting has thereunto subscribed ¿er name and affixed her official seal, was, at the

time of so doing, and now is, County Clerk and ex Officio Clerk of the Superior Court, duly commissioned and qualified, and that said attestation is in due form and made by the proper officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 27th day of September, 1978.

/s/ Marvin E. Ferguson
Judge of the Superior Court

CERTIFICATE OF CLERK

State of California, County of Kern

I, Vera K. Gibson, County Clerk and ex Officio Clerk of the Superior Court, do certify that Honorable Marvin E. Ferguson, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of the making of the same, and still is, Judge of the Superior Court within and for Kern County, California, duly commissioned and qualified according to law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, this 27th day of September, 1978.

/s/ Vera K. Gibson
County Clerk and ex Officio
Clerk of Superior Court

ATTESTATION OF KEEPER OF RECORDS

Appendix C

In the United States District Court
Eastern District of California

No. F-1236-Bky

In the Matter of
Sam W. Chernabaeff
Bankrupt

ORDER CONTINUING RESTRAINING ORDER AND FOR DISSOLUTION OF ORDER ON ENTRY OF DISCHARGE

At Fresno in said district, the 9th day of December, 1970.

The Petition of Chester A. and Ruby T. Ashford for a dissolution of the temporary restraining order heretofore issued, came on for hearing the 4th day of December, 1970, Kenneth H. Bates of Deadrich, Bates & Lund appearing for petitioners, and William A. McGugin appearing for the bankrupt, and the court having heard the argument of the parties and considered the evidence, finds that all of the allegations of the Petition for Order Dissolving Temporary Restraining Order Re State Court Action, are true and further finds that the discharge of the bankrupt, Sam W. Chernabaeff, has not as yet been granted, and having concluded that the restraining order should continue in effect until the bankrupt's discharge is granted and should then be dissolved, now on motion of attorneys for petitioners, and good cause appearing,

It is ORDERED:

1. That the "Temporary Restraining Order and Order to Show Cause to Restrain State Court Action" issued herein on or about May 5, 1967 and the restraining orders issued pursuant thereto, be and they are continued in effect until the discharge of the debtor, Sam W. Chernabaeff, shall have been granted; and

2. That on the 30th day following the entry of the "Discharge of Bankrupt" to be entered herein pursuant to Section 14 of the Act Relating to Bankruptcy, the said

restraining order restraining petitioners and their attorneys from proceeding with the action now pending in the Superior Court of the State of California, In and For the County of kern, entitled, "Chester Ashford and Ruby Terry Ashford, husband and wife, Plaintiffs, vs. Sam Chernabaeff and Sally Chernabaeff, individually, et al, defendants", being proceeding No. 93987, shall be dissolved, vacated and terminated.

Charles F. Hamlin
Referee in Bankruptcy

United States District Court
for the
Eastern District of California
In Bankruptcy No. F-1236-Bky
In the Matter of
Sam Chernabaeff

DISCHARGE OF BANKRUPT

It appearing that on April 4, 1967, a Petition in Bankruptcy was filed in the above entitled matter; the bankrupt was duly adjudged a bankrupt; and that after fue notice by mail, no objections to the discharge of the bankrupt were filed within the time fixed by the Court, or objections to the discharge of the bankrupt were filed and heard and were not sustained; NOW THEREFORE,

It is ordered that the above Sam Chernabaeff is hereby discharged from all debts and claims which, by the Bankruptcy Act, are made provable, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

DATED: December 8, 1970

/s/ Charles F. Hamlin
Referee in Bankruptcy

IMPORTANT: If a lawsuit is brought against you based on one of the debts listed in your bankruptcy schedules, you should immediate consult your attorney. Failure to answer such action could result in an enforceable default judgement being taken against you notwithstanding the issuance of this discharge.

Appendix D

In the Superior Court of the State of California
In and For the County of Kern
No. 98987

Chester Ashford and Ruby Terry Ashford, husband and wife,
Plaintiffs,

vs.

Sam Chernabaeff and Sally Chernabaeff, individually; and
Sam Chernabaeff and Sally Chernabaeff doing business as
Black Company, a copartnership;
Green Company, a corporation;
Yellow Company, a coportnership;
Doe I and Doe II
Defendants

Come how the defendants San Chernabaeff and Sally Chernabaeee individually and as a copartnership, who answer the complaint on file herein as follows:

ANSWER TO FIRST CAUSE OF ACTION

I

Answering paragraphs II, V, VI, VII, IX and X, these answering defendants deny generally and specifically each and every allegation contained therein, and specifically that the plaintiffs were damaged in the sum alleged or sums alleged or any other sum or sums, or were damaged at all as a result of the conduct alleged.

ANSWER TO SECOND CAUSE OF ACTION

I

Answering paragraphs I, II and III, these answering defendants deny generally and specifically every allegation contained therein, and particularly that the plaintiffs were

damaged in the sum alleged or sums alleged or any other sum or sums as a result of the conduct alleged.

ANSWER TO THIRD CAUSE OF ACTION

I

Answering paragraphs I, II and III, these answering defendants deny generally and specifically each and every allegation contained therein, and specifically that the plaintiffs were damaged in the sum alleged or sums alleged or any other sum or sums at all by the conduct alleged.

FIRST AFFIRMATIVE DEFENSE

I

The defendants, and each of them, duly filed in the United States District Court for the Eastern District of California on April 4, 1967, a Petition to be adjudged a bankrupt, together with the schedules required to be filed with said Petition, and thereafter such proceedings were duly had on said Petition; that on December 8, 1970 by order duly granted by said court, defendants were duly adjudicated bankrupts; that claim which is the subject matter of this action was duly listed and set forth in said schedules and plaintiffs had due notice and actual knowledge of said proceeding and of said adjudication, and further, that the transaction referred to in the complaint on file herein, was duly discharged in said bankruptcy under the Bankruptcy Act which is a bar to the claim in this action.

SECOND AFFIRMATIVE DEFENSE

I

The plaintiffs, and each of them, knew or should have known of the financial condition of the defendants, and each of them, when negotiating with said defendants, and in fact did not rely upon any representations of said defendants, but in fact relied upon their own personal judgment and business acumen for the purposes of an expeditious, highly-profitable speculation.

WHEREFORE,

1. Defendants pray that plaintiffs take nothing by the

complaint on file herein;

2. Defendants pray that they be awarded their costs of suit herein;

3. For such other and further relief as to the court may seem just and proper under the circumstances.

Daly and Keon

By /s/ James F. Keon
Attorney for Defendants

Appendix E

United States District Court
For the District of Oregon
In Bankruptcy
Nos. 77-01122 & 77-01123

In Re Sam William Chernabaeff and Sally Chernabaeff
Bankrupts,
Chester Ashford and Ruby Terry Ashford,
Plaintiffs,
vs.
Sam William Chernabaeff and Sally Chernabaeff,
Defendants

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT

This cause having come on to be heard on Motion of Plaintiffs, Chester Ashford and Ruby Terry Ashford, for a Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the action, the Pre-trial Order, the responses of Plaintiffs to Interrogatories propounded by Defendants, all documents and affidavits submitted by Plaintiffs and Defendants and the Findings of Fact and Conclusions of Law and Judgment entered in Kern County Superior Court, State of California, Action No. 98987, a copy of which Findings of Fact and Conclusions of law and Judgment are attached hereto and included as an exhibit to this Judgment, and having heard oral argument, and having found that there is no genuine issue of fact to be submitted for trial to the Court, and having concluded that Plaintiffs are entitled to judgment as a matter of law, it is hereby

ORDERED, that Plaintiffs' Motion For a Summary Judgment is in all respect granted, and it is further

ORDERED, adjudged and decreed that the claim of Plaintiffs against Defendants is nondischargeable in the Bankruptcy Court and the Findings of Fact and Conclusions of Law and Judgment entered in the Kern County Superior Court, State of California, copies of which are attached hereto and included as an exhibit to this Judgment are supported by the evidence

taken by the Superior Court, and that the Kern County Superior Court had jurisdiction to determine that the obligation sued upon by Plaintiffs against Defendants was nondischargeable in bankruptcy. There is therefore no basis for this Court to interfere with said Judgment, and this Court gives full faith and credit to the Findings of Fact and Conclusions of Law and Judgment entered by the Kern County Superior Court, State of California, and should not be disturbed, and thus Defendants owe Plaintiffs the sum of Fifty Thousand Dollars ($50,000) plus interest at the rate of 7% per annum from March 10, 1967, and Plaintiffs shall have judgment accordingly.

DATED: May 22, 1979

/s/ C.E. Luckey
Bankruptcy Judge

Opposition

2

81-530

Office - Supreme Court, U.S.
FILED
NOV 2 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

SAM WILLIAM CHERNAFAEFF,

Plaintiff,

vs.

DAVID R. MOSS,
CHESTER ASHFORD and
RUBY TERRY ASHFORD,

Respondents.

BRIEF OF RESPONDENT DAVID R. MOSS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK H. LAGESEN
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David R. Moss

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

SAM WILLIAM CHERNAFAEFF,

Plaintiff,

vs.

DAVID R. MOSS,
CHESTER ASHFORD and
RUBY TERRY ASHFORD,

Respondents.

BRIEF OF RESPONDENT DAVID R. MOSS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Respondent Moss does not accept the petitioner's statement of the Questions

Presented because the respondent does not complain of being denied a trial on the issue of dischargeability of his claim, nor does respondent believe petitioner was denied a full and fair hearing on that issue.

Therefore, respondent submits that a more accurate statement of the Questions Presented is:

If a bankruptcy judge has made a determination through independent inquiry that a state court judgment is nondischargeable for having arisen out of the bankrupt's (petitioner's) fraudulent acts, is the bankrupt entitled to a further hearing on the issue of dischargeability simply because the judgment was renewed under

applicable state law subsequent to the bankruptcy court's initial judgment of nondischargeability?

OPINIONS BELOW

Petitioner's description of the Opinions Below is incomplete in that it fails to include the following pertinent opinion and judgment:

The opinion and order of the Bankruptcy Court dated March 23, 1978 dismissing petitioner's appeal from the judgment of October 11, 1977 declaring respondent's state court judgment against petitioner nondischargeable is reproduced in the appendix together with the judgment of the U.S. District Court affirming the bankruptcy judge.

STATUTES INVOLVED

In addition to that portion of 11 USC §523 cited by petitioner the following section is also pertinent:

§523. Exceptions to Discharge

"(a) A discharge under §727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --

* * *

"(2) For obtaining money, property, services, or an extension, renewal, or refinance of credit, by --

"(A) False pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or

"(B) Use of a statement in writing --

"(i) that is materially false;

"(ii) respecting the debtor's or an insider's financial

condition;

"(iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services or credit reasonably relied; and

"(iv) that the debtor caused to be made or published with intent to deceive; --------"

STATEMENT OF THE CASE

On July 18, 1967, the United States District Court (ED, Cal.) in No. F-1236-BKY entered findings of fact and conclusions of law to the effect that respondent's claim against the petitioner allegedly arose out of petitioner's fraudulent acts and that a restraining order previously entered by the court against respondent should be dissolved (App, infra, p. A-1). On July 18, 1967 judgment was entered accordingly (App, infra, p. A-5).

Respondent prosecuted his action

against petitioner and in March 1968, petitioner signed a stipulation in which he agreed that a judgment could be entered against him in the Superior Court of the State of California for the County of Kern based upon fraud and misrepresentation (App, infra, p. A-8). Findings of Fact and Conclusions of Law (App, infra, p. A-14) were entered pursuant to the stipulation and on July 2, 1968 a judgment was entered pursuant to the stipulation (App, infra, p. A-29).

In May 1977 respondent filed an Application for Determination of Dischargeability in the United States District Court (DC, Or) Case Nos. 77-01122 and 77-01123) (App, infra, p.

A-32). On September 19, 1977 a hearing was held in the Bankruptcy Court in which petitioner and respondent both presented evidence on the issue of dischargeability (App, infra, p. A-35). On October 11, 1977 judgment was entered declaring the respondent's California judgment against petitioner nondischargeable pursuant to Section 17 of the Bankruptcy Act (App, infra, p. A-45).

Petitioner's appeal from the October 11, 1977 judgment was subsequently dismissed because the notice of appeal was not timely filed (App, infra, p. A-47).

On February 21, 1979 a judgment was entered in the Superior Court of the

State of California for the County of Kern reaffirming and renewing the respondent's 1968 judgment against petitioner in its entirety (App, infra, p. A-53).

Petitioner filed a Petition to Amend Schedules to include the renewed California judgment, and on June 29, 1979 the Bankruptcy judge issued a written opinion allowing the Petition to Amend Schedules but further stating:

> "As acknowledged by the bankrupts in their motion, I have already considered the question of dischargeability of the claim on which the renewed judgment is based. In making this determination, I did not determine that the judgment was discharged, but that the claim underlying it was based on fraud, and therefore, that the debt was not dischargeable in bankruptcy. I conducted an independent factual inquiry into the circumstances of the claim, as

> is appropriate under the Bankruptcy Act. I also considered the original judgment as evidence of the debt for purposes of determining the amount of the claim." In the Matter of Orsino, 1 Bankr. Ct. Dec. 1187 (S.D.N.Y. 1975). In the Matter of Brough, 2 Bankr. Ct. Dec. 291 (W.D. Mich. 1976).
>
> "I have fully considered the question of dischargeability of the claim. It is not the purpose of this court in allowing the bankrupts to amend their schedules to force the plaintiff to relitigate this question. The doctrine of collateral estoppel precludes the redetermination of a fact issue which has been determined in a prior proceeding. In the Matter of Brotherton, 2 Bankr. Ct. Dec. 283 (Ore. 1975, Sullivan, J.). The renewal of the judgment does not change the nature of the underlying claim." (Pet. p. A-6, A-7).

Petitioner appealed the Bankruptcy Court's decision to the United States District Court which by opinion and judgment dated September 13, 1979 (App, infra, p. A 47, 52) affirmed the

decision of the bankruptcy judge. On May 20, 1981 the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (Pet. p. A-1, A-2), and on August 10, 1981 denied the petition for rehearing and a suggestion for hearing en banc (Pet. A-3, A-4).

SUMMARY OF ARGUMENT

Petitioner has had his day in court on the issue of dischargeability, and the mere fact that the judgment was renewed does not entitle petitioner to an additional hearing on the same issue.

ARGUMENT

The sole issue in this case is whether a renewed judgment takes on a different character from the judgment on

which it is based, thereby entitling a bankrupt to a second hearing on the issue of dischargeability.

Petitioner cites no authority for his position that a second hearing is required under bankruptcy law and respondent has found none. The Bankruptcy Court, the United States District Court, and the Ninth Circuit Court of Appeals all found to the contrary.

In light of the policy considerations obviously underlying the nondischargeability provisions of § 17 of the Bankruptcy Act (now 11 USC §523) there is no reason why the mere passage of time should enable a bankrupt to avoid a determination that a judgment is

nondischargeable.

Petitioner's petition is inaccurate in several respects, but respondent will only note that Brown vs. Felsen, 442 US 127, 99 Sup. Ct. 2205, 60 L Ed2d 767 (1979) is not in point since an independent inquiry was made in the instant case as to the dischargeability of the judgment. For a decision more analogous to this case see In Re Manitta, 1 Bankr. 393 (US Bkrptcy Ct. C.D. Cal. 1979) in which Brown vs. Felsen is distinguished. Manitta involved circumstances where the state court, in rendering a judgment against the bankrupt, entered detailed findings of fact regarding the bankrupt's fraudulent acts. In the instant case

the bankrupt had stipulated to the entry of a judgment based upon his fraudulent acts (App, infra, p. A-8).

CONCLUSION

The petition for writ of certiorari should denied.

Respectfully submitted,

COSGRAVE, KESTER, CROWE,
GIDLEY & LAGESEN

By:_____
Frank H. Lagesen
Of Attorneys for Appellee

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In the Matter of SAM W. CHERNABAEFF, Debtor,	)	No. F-1236-BKY
SAM W. CHERNABAEFF, debtor, Petitioner, vs. W. STEVE CLARES, MARGARET MARIE CLARES, TRANS-AMERICA TITLE INSURANCE CO., HENRY A. KETSDIVER, BETTY B. KETSDIVER, SCOTT WARREN, ZEPHA WARREN, COMMERCIAL CREDIT EQUIP-MENT CO., R. B. "SANDY" ROGERS, DAVID R. MOSS, ALLAN H. McFARLAND, DANNY REED, ROBERT THOMPSON, and REED AND THOMPSON, a co-partnership composed of Danny reed and Robert Thompson, Respondents.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for hearing on May 12, 1967, and the petitioner, Sam W. Chernabaeff,

being present in Court with his attorney, W. A. McGugin, and the respondent not being present in Court but represented by his attorneys, Vizzard, Baker, Sullivan & McFarland, Allan H. McFarland of counsel appearing, and the Court having taken evidence and having been submitted for decision and having considered the matter, and good cause appearing, the Court does make the following Findings of Fact:

FINDINGS OF FACT

1. That it is true that there is presently pending a Superior Court action No. 96993 between respondent and petitioner.

2. That it is further true that the pleading in said action contains

allegations of fraud and misrepresentation, which, if they are true, would be a non-dischargeable type of obligation.

3. That there is no showing whatsoever that the Kern County Superior Court action No. 96993 if prosecuted against the petitioner will have any adverse effect against the petitioner, or will hinder or interfere with the presently pending rehabilitation proceedings in the above entitled Court.

4. That it is true that this Court has previously issued a restraining order against the respondent restraining him from proceeding in said action.

5. That it is further true that said restraining order should be

dissolved in its entirety.

From the foregoing Findings, the Court makes its conclusions of law as follows:

CONCLUSIONS OF LAW

That the restraining order previously issued in this matter restraining respondent from prosecuting or pursuing Kern County Superior Court action No. 96993 is dissolved, and the aforesaid respondent is entitled to pursue any remedies of any kind, type or nature which he may have in Kern County Superior Court action No. 96993.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 18, 1967.

/s/
Referee in Bankruptcy

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In the Matter of SAM W. CHERNABAEFF, Debtor,	Nc. F-1236 -BKY
SAM W. CHERNABAEFF, debtor, Petitioner, vs. W. STEVE CLARES, MARGARET MARIE CLARES, TRANS-AMERICA TITLE INSURANCE CO., HENRY A. KETSDIVER, BETTY B. KETSDIVER, SCOTT WARREN, ZEPHA WARREN, COMMERCIAL CREDIT EQUIP-MENT CO., R. B. "SANDY" ROGERS, DAVID R. MOSS, ALLAN H. McFARLAND, DANNY REED, ROBERT THOMPSON, and REED AND THOMPSON, a co-partnership composed of Danny reed and Robert Thompson, Respondents.	JUDGMENT

This matter having come on regularly for hearing on May 12, 1967, and the petitioner, Sam W. Chernabaeff,

being present in court with his attorney, W. A. McGugin, and the respondent not being present in Court but represented by his attorneys, Vizzard, Baker, Sullivan & McFarland, Allen H. McFarland of counsel appearing, and the Court having taken evidence and having been submitted for decision and having considered the matter, and Findings of Fact and Conclusions of Law having been made, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a restraining order previously issued in this matter restraining David R. Moss and Allan H. McFarland from proceeding in Superior Court Action No. 96993 is hereby

dissolved and said respondents may proceed and take any methods or action necessary in said action.

DATED: July 18, 1967.

/s/
REFEREE IN BANKRUPTCY

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

DAVID R. MOSS,	)	
	)	
Plaintiff,	)	
	)	No. 96993
vs.	)	
	)	STIPULATION
SAM W. CHERNABAEFF, SALLY CHERNABAEFF, R. B. ROGERS, also known as SANDY ROGERS, et al,	)	
	)	
Defendants.	)	

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties above named, through their respective attorneys that this matter is now set for jury trial on Monday, April 1, 1968 in the above entitled court.

IT IS FURTHER STIPULATED that the parties hereto do desire a compromise and settlement of all rights and obligations, duties and liabilities that may arise out of the litigation therein and are thereby entered into this

stipulation with the understanding that each of them has had the advise and representation of counsel through the entire negotiations

IT IS FURTHER STIPULATED that the trial date of Monday, April 1, 1968 will be vacated and dropped from the calendar.

IT IS FURTHER STIPULATED that the defendants SAM W. CHERNABAEFF and SALLY CHERNABAEFF do hereby consent and agree to pay the sum of $16,000.00 to the plaintiff for settlement of this complaint, said sum to be paid at the rate of $5,000.00 cash within thirty days from the date of execution of this agreement and the balance thereof of $11,000,00 paid within six months from

date of execution of this agreement.

IT IS FURTHER STIPULATED that in the event and for any cause or reason whatsoever, the sums of money stipulated and agreed to herein are not paid on the dates due, then the full amount shall be deemed accelerated and defendants, by execution of this agreement, do consent and agree to entry of a judgment in the above entitled court against them for the sum of $20,000.00 and said judgment may be entered ex parte on application of the plaintiff upon a showing that the sums of money stipulated herein have not been paid when due. Said judgment shall be for the sum of $20,000.00 and will be subject to all the terms and provisions of enforcement by the above entitled

court.

IT IS FURTHER STIPULATED and agreed that in the event the judgment is applied for and obtained by the plaintiff herein for failure of defendants to make the payments agreed upon, that the defendants do acknowledge that the $20,000.00 judgment herein is based upon all of the allegations in the Second Cause of Action of plaintiff's First Amended Complaint on file which has reference to fraud and misrepresentation and the defendants do admit for the purposes of this judgment that all of the allegations in said complaint are true and they do, by this stipulation, waive any right to go behind the judgment and claim or allege

that said judgment is not based upon the fraud cause of action.

IT IS FURTHER STIPULATED that if the judgment is requested by virtue of the default of the defendants herein for the $20,000.00 aforesaid, the plaintiff is hereby authorized to request the above entitled court upon application to make a finding and conclusion of law and insert it in any judgment that said judgment is specifically based upon fraud and misrepresentation.

IT IS FURTHER STIPULATED that this stipulation shall be filed with the above entitled court after execution by all of the parties.

IT IS FURTHER STIPULATED that the cross-complaint in this matter filed by

the defendants may be dismissed with prejudice.

Dated this 28th day of March, 1968.

VIZZARD, BAKER, SULLIVAN
& McFARLAND

By/s/ Richard M. Long
Attorneys for Plaintiff

SIMS AND SOLOMON

By/s/ Gabriel W. Solomon
Attorneys for defendants
SAM W. CHERNABAEFF and
SALLY CHERNABAEFF

/s/ Sam W. Chernabaeff
Sam W. Chernabaeff

/s/ Sally Chernabaeff
Sally Chernabaeff

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

DAVID R. MOSS, Plaintiff, vs. SAM W. CHERNABAEFF, SALLY CHERNABAEFF, R. B. ROGERS, also known as SANDY ROGERS, DOE I, DOE II, and DOE III, Defendants.	No. 96993 FINDINGS OF FACT AND CONCLUSIONS OF LAW
SAM AND SALLY CHERNABAEFF, Cross-complainants, vs. R. B. "SANDY" ROGERS, DAVID R. MOSS, ALLAN H. McFARLAND, DANNY REED, ROBERT THOMPSON, AND REED AND THOMPSON, a partnership, Cross-defendants.	

The Court being satisfied that plaintiff is represented in the above entitled matter by Vizzard, Baker, Sullivan, McFarland & Long, and the

defendants, Sam W. Chernabaeff and Sally Chernabaeff, being represented by Sims & Solomon, attorneys at law; and that a Stipulation having been duly entered into by plaintiff and defendants, Sam W. Chernabaeff and Sally Chernabaeff, and their respective attorneys, the same being on file with the Court, and reference to is hereby made, and upon reading and being satisfied with the Declaration of plaintiff's counsel in re Application for Judgment, and the matter having been submitted for decision, the Court, after being fully advised in the premises, makes it findings of fact as follows:

FINDINGS OF FACT

It is true that:

-I-

That prior to the filing of the above entitled matter by written assignment, Allan H. McFarland did assign to plaintiff, David R. Moss, all of his right, title and interest in and to the cause of action set out in the First Amended Complaint on file herein for purposes of collection and litigation.

-II-

That on or about June 15, 1966, the defendants, Sam W. Chernabaeff and Sally Chernabaeff, were seized in fee simple certain real property described in Exhibit "A" attached to the First Amended Complaint on file herein, which is incorporated by reference into this

Finding of Fact as though same was set out herein at length.

-III-

That on June 13, 1966, plaintiff and defendants, Sam W. Chernabaeff and Sally Chernabaeff, entered into an agreement in writing whereby plaintiff agreed to buy, and defendants, and each of them, agreed to sell certain properties as set forth in Exhibit "A" attached to the First Amended Complaint, said provisions of Exhibit "A" is incorporated herein as though fully set out at length. That the defendants, and each of them, agreed to buy from plaintiff the business commercially known and referred to as "The Jasmine Tree and Jasmine Inn" for the sale and

exchange of that real property plaintiff has described in Exhibit "A" attached to the First Amended Complaint on file herein, which is incorporated herein by reference.

-IV-

That the defendants, Sam W. Chernabaeff and Sally Chernabaeff, pursuant to written escrow instructions did enter into and take possession of the "Jasmine Tree and Jasmine Inn" and did operate, maintain and control said "Jasmine Tree and Jasmine Inn" from and after June 15, 1966, and did receive all profits and moneys flowing forth from said "Jasmine Tree and Jasmine Inn".

-V-

That at various and diverse

occasions from June 15, 1966, the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did falsely and fraudulently represent to the plaintiff that said defendants, Sam W. Chernabaeff and Sally Chernabaeff, would sell and exchange the real property described in Exhibit "A" attached to the First Amended Complaint, said Exhibit "A" is incorporated by reference as though set out herein at length, for the business commercially known and referred to as the "Jasmine Tree and Jasmine Inn".

-VI-

That the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did falsely and fraudulently represent to plaintiff that if possession of said

"Jasmine Tree and Jasmine Inn" would be delivered to the defendants, Sam W. Chernabaeff and Sally Chernabaeff, upon the opening of escrow so that said defendants could operate, manage and control and take forth the profits of said "Jasmine Tree and Jasmine Inn" that the escrow referred to in Exhibit "A" as aforementioned would be closed as expeditiously as possible.

-VII-

That the plaintiff did believe the false and fraudulent representations of the defendants, and each of them.

-VIII-

That the plaintiff did turn over the operation, management and control of the "Jasmine Tree and Jasmine Inn" as a

profitable business to the defendants, Sam W. Chernabaeff and Sally Chernabaeff. That the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did maintain, control and operate said "Jasmine Tree and Jasmine Inn" from and after June 15, 1966, and did take all profits from said businesses.

-IX-

That the defendants, Sam W. Chernabaeff and Sally Chernabaeff, when they made the representations to plaintiff to the effect that if possession of said "Jasmine Tree and Jasmine Inn" would forthwith be delivered to the defendants, and each of them, upon the opening of escrow, that the defendants, and each of them, would

close said escrow as expeditiously as possible, and transfer the real property set out Exhibit "A" attached to the First Amended Complaint, knew them to be false, and that the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did at no time have any intentions of completing said sale or exchange their said property as set out in Exhibit "A" attached to the First Amended Complaint for said "Jasmine Tree and Jasmine Inn", but were in fact going into possession of the aforesaid "Jasmine Tree and Jasmine Inn" for the purpose of taking all profits from the business and not paying any of the obligations or liabilities. That the defendants, Sam W. Chernabaeff and Sally Chernabaeff,

did destroy the good will and deplete the assets of said "Jasmine Tree and Jasmine Inn" and thus totally destroyed said gainful businesses.

-X-

That after the "Jasmine Tree and Jasmine Inn" were placed in the possession and delivered to the defendants, Sam W. Chernabaeff and Sally Chernabaeff, by plaintiff, said businesses were intentionally mismanaged and no effort was made to properly take care of said business even though the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did represent that they would properly operate, manage and control said business until such time as the escrow was closed.

-XI-

That the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did take possession of and control of the "Jasmine Tree and Jasmine Inn" for the purpose of fraudulently taking possession of the same and fraudulently taking the profits and moneys of said businesses for their own personal use.

-XII-

That the possession of the "Jasmine Tree and Jasmine Inn" would not have been placed into the defendants, Sam W. Chernabaeff and Sally Chernabaeff, by plaintiff had plaintiff known that said defendants, and each of them, were going to mismanage and misuse and improperly care for said business. That possession

of said "Jasmine Tree and Jasmine Inn" would not have been turned over to defendants, and each of them, had plaintiff known that said defendants, and each of them, never intended to close said escrow and exchange the property to plaintiff as set out in Exhibit "A" attached to the First Amended Complaint.

-XIII-

That the representations of the defendants, Sam W. Chernabaeff and Sally Chernabaeff, were false and fraudulent, and said representations were used with the intent to defraud and deceive plaintiff, and fraudulently induce plaintiff to deliver the possession of the "Jasmine Tree and Jasmine Inn" to

said defendants, and each of them.

-XIV-

That by reason of the fraud and misrepresentations on the part of the defendants, Sam W. Chernabaeff and Sally Chernabaeff, to plaintiff, plaintiff has been damaged in the sum of $20,000.00.

FROM THE FOREGOING FACTS THE COURT CONCLUDES:

CONCLUSIONS OF LAW

-I-

That all the allegations contained in the second cause of action of the First Amended Complaint on file with the above entitled Court are true.

-II-

That the defendants, Sam W. Chernabaeff and Sally Chernabaeff, did

perpetrate fraud, and make fraudulent misrepresentations to the plaintiff in order to take possession of, control, and operate the business known as the "Jasmine Tree and Jasmine Inn" for the purpose of taking profits and moneys from said business for defendants, and each of them, own use.

-III-

That plaintiff, David R. Moss, have judgment against defendants, Sam W. Chernabaeff and Sally Chernabaeff, for the sum of $20,000.00, together with interest on said sum at the rate of seven per cent per annum from April 1, 1968 until judgment is satisfied, together with his costs of suit incurred herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 2, 1968.

/s/Walter Osborn, Jr.
JUDGE OF THE SUPERIOR COURT

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

DAVID R. MOSS, Plaintiff, vs. SAM W. CHERNABAEFF, SALLY CHERNABAEFF, R. B. ROGERS, also known as SANDY ROGERS, DOE I, DOE II, and DOE III, Defendants.	)	No. 96993 JUDGMENT
SAM AND SALLY CHERNABAEFF, Cross-complainants, vs. R. B. "SANDY" ROGERS, DAVID R. MOSS, ALLAN H. McFARLAND, DANNY REED, ROBERT THOMPSON, AND REED AND THOMPSON, a partnership, Cross-defendants.	)	

Upon application of the plaintiff, David R. Moss, and upon the Court having been advised of the Stipulation between plaintiff and the defendants, Sam W.

Chernabaeff and Sally Chernabaeff, and for good cause appearing, and upon the Court being satisfied that the defendants, Sam W. Chernabaeff and Sally Chernabaeff, having been represented by counsel of record, Sims & Solomon, and plaintiff having been represented by his attorneys, Vizzard, Baker, Sullivan, McFarland & Long, and the Court having examined proofs offered by the parties, and the cause having been submitted for decision, and the Court having been fully advised in the premises, and the Court having previously filed its Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, David R. Moss, have judgment against defendants, Sam W.

Chernabaeff and Sally Chernabaeff, in the sum of $20,000.00 on the second cause of action of the First Amended Complaint on file herein for fraud and misrepresentations, plus interest on said sum at the rate of seven per cent (7%) per annum from April 1, 1968 until judgment is satisfied, plus costs of suit in the amount of $333.15.

DATED: July 2, 1968.

/s/ Walter Osborn, Jr.
JUDGE OF THE SUPERIOR COURT

APPENDIX F

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF OREGON

DAVID R. MOSS,	)	
	)	
Plaintiff,	)	
	)	Nos. 77-01122
vs.	)	77-01123
	)	APPLICATION
SAM W. CHERNABAEFF and	)	FOR DETERMI-
SALLY CHERNABAEFF,	)	NATION OF
	)	DISCHARGE-
Defendants.	)	ABILITY

Comes now DAVID R. MOSS, by and through his Attorney, O. W. GOAKEY, and moves the Court for an Order denying dischargeability of the claim of DAVID R. MOSS, set forth in the above numbered bankruptcies, on the ground and for the reason that the Judgment of DAVID R. MOSS, entered by the Superior Court of the State of California for Kern County in case No. 96993, was based on the fraud of SAM W. CHERNABAEFF and SALLY CHERNABAEFF, as shown by Exhibit "A" which is attached hereto, and by

this reference incorporated herein and made a part of this Objection to Discharge. That said Exhibit consists of the findings of fact and conclusions of law of said Court and the Judgment based thereon and that on Page 3, Paragraph VI, of said findings of fact and conclusions of law, as set forth in Paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV, that Defendants did commit fraud.

That further, the Court found in its conclusions of law, commencing on Page 5, Paragraph I, that the Defendants SAM W. CHERNABAEFF and SALLY CHERNABAEFF, did perpetrate fraud and made fraudulent representations to DAVID R. MOSS, as a matter of law.

Wherefore, DAVID R. MOSS, prays that a time be set and notice be given for the holding of a hearing in order that the Court might take evidence and issue an Order determining the dischargeability of the Judgment of DAVID R. MOSS.

/s/ O. W. Goakey
O. W. GOAKEY,
Attorney for DAVID R. MOSS

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re THE CONSOLIDATED ESTATES OF SAM W. CHERNABAEFF and SALLY CHERNABAEFF, Bankrupt(s)	)	Nos. 77-01122 77-01123 SUMMARY OF PROCEEDINGS AND RECORD OF HEARING

At Eugene, in said District, this 19th day of September, 1977:

This matter coming on to be heard on July 26, 1977 at 3:00 p.m. in Klamath Falls, being a hearing to determine dischargeability of debt under Section 17(a), Moss v. Bankrupts, of which due notice was mailed as required by law, I, the undersigned Judge in charge of this bankruptcy, certify that I sat at the time and place designated, when the following proceedings were had: Appearances: The Bankrupts appeared and were represented by their attorney, Mr. Ramirez, the plaintiff, Mr. Moss, and

the plaintiff's attorney, Mr. Goakey, also appeared.

The plaintiff introduced five exhibits, Exhibit No. 1 - Stipulation; Exhibit No. 2 - Judgment; Exhibit No. 3 - Findings and Judgment; Exhibit No. 4 - Findings; and Exhibit 5 - Complaint, all five exhibits were received by the Court without objection.

The plaintiff called as his first witness, Allan H. McFarland of 1801 Truxten Ave., Bakersfield, California. Mr. McFarland testified he is an attorney in California. Plaintiff owns a paint store and is a contractor. Mr. McFarland testified that in 1964 the plaintiff purchased a bar, motel and restaurant and Mr. McFarland was

financial backer, owning 1/2 interest. In June, 1966 the bar, motel and restaurant was listed for sale. The defendant approached the owners about buying the bar through Sandy (Rufus) Rogers, a broker who represented the defendant. The motel entered into escrow. The defendant requested immediate possession of the bar. Plaintiff gave defendant possession before closure of escrow so that the business could remain open. The liquor license worth $15,000.00 to $20,000.00 was transferred into defendant's name. Under California law, the license was non lienable and nontransferable.

In September, 1966, plaintiff determined that the escrow was not being

closed, payments were not being made, the motel was running down and the liquor inventory diminishing.

A California Superior Court fraud action was filed by plaintiff against defendants herein. See Exhibit No. 5. The defendant was represented by attorney Gabriel Solomon, who is now president of the local bar association. Eventually, the bar was closed and the underlying trust deed was lost.

In January, 1967, a Chapter XI was filed by the defendants. Pursuant thereto, a restraining order was issued restraining state action. The defendants were represented by William A. McGugin. Mr. McGugin is still practicing law and is now in his '70's.

A Chapter XI bankruptcy fraud suit was tried May 12, 1967. The hearing was contested and tried with the aid of extensive points and authorities. The California state trial was called in April, 1968. While the jury was being impanelled, Long, Solomon and McFarland worked out stipulated findings in the presence of the Defendant. All three attorneys explained the non-dischargeability aspects of the findings to defendant. The defendant acknowledged the stipulation. The court entered judgment and made specific findings.

The defendant has been in McFarland's office several times and has acknowledged non-dischargeability.

The plaintiff introduced Exhibit No. 6, Deposition, pages 49-51. Exhibit No. 6 was received without objection.

On cross examination, the witness, Mr. McFarland, testified he invested $50,000.00. The witness assigned his interest in the bar to the plaintiff for other property interests. The witness wrote off the $50,000.00 over three tax years.

The defendant introduced Exhibit No. 1, a newspaper clipping, which was received without objection. The sale price of the bar was approximately $125,000.00 when the bar was sold to the defendant by the plaintiff.

The defendant operated under a California liquor license in the name of

Rufus Rogers.

Rogers' was selling defendant's 160 acres at Wasco to get the money to buy the bar. The defendant was a farmer at that time.

Rogers was dismissed from liability in the California state action upon execution of the above stipulation by the defendant.

Ivy Person is a legal secretary in Bakersfield, California. In 1968 she was Solomon's secretary.

The defendant called himself as his first witness.

The defendant testified that he is 57 years of age. In 1966 he was a farmer in Wasco. The defendant testified that he never owned motel and

bar. The defendant responded to a newspaper ad in the name of Thompson & Reed and saw Sandy Rogers concerning 160 acres of farm land. Rogers suggested a three way deal whereby another party would buy the motel.

The defendant testified that he didn't want the motel, only farm property closer in. Rogers delivered cash receipts from the bar to the defendant after picking it up from Pete Robles, a bartender. The defendant testified that he never operated the bar and motel. Since the third party did not take the motel, the defendant's deal was off.

The defendant testified that he paid for the liquor license in someone

else's name. The license cost $456.00.

The defendant testified that he did not get anything from the 160 acres sold or from the bar.

The defendant filed the California Chapter XI because a lender called in a loan. The defendant paid $5,504.64 taxes due from the Jasmine Bar. The defendant paid $1,600 toward plaintiff's California state court judgment.

The defendant testified in reference to the signed state court stipulation that no one explained the judgment which appeared to be a fraud judgment. The stipulation was signed in Solomon's office. The defendant testified that there were no misrepresentations. The defendant

testified he never represented to anyone that he wanted to take over the bar.

/s/ Michael R. Hogan
MICHAEL R. HOGAN
Bankruptcy Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SAM WILLIAM CHERNABAEFF and SALLY CHERNABAEFF, Bankrupt(s)	)	IN BANKRUPTCY Nos. 77-01122 and 77-01123
DAVID R. MOSS, Plaintiff, vs. SAM WILLIAM CHERNABAEFF and SALLY CHERNABAEFF, Defendants.	)	JUDGMENT

The Judgment entered in the Superior Court of the State of California for Kern County in case #96993 in favor of plaintiff and against defendants is declared non-dischargeable pursuant to Section 17 of the Bankruptcy Act.

IT IS SO ORDERED.

DATED this 11th day of October, 1977.

/s/ Michard R. Hogan
BANKRUPTCY JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

IN RE SAM WILLIAM CHERNABAEFF and SALLY CHERNABAEFF, Bankrupts, DAVID R. MOSS, Plaintiff, vs. SAM WILLIAM CHERNABAEFF and SALLY CHERNABAEFF, Defendants.	Bankruptcy Nos. 77-01122 and 77-01123 OPINION AND ORDER

On October 11, 1977, judgment was entered by this court declaring the judgment entered by the Superior Court of the State of California for Kern County in case #96993 in favor of plaintiff and against defendants nondischargeable pursuant to §17 of the Bankruptcy Act. On October 31, 1977, defendants filed a "Notice of Appeal to District Court" from the October 11,

1977 judgment of this court. On November 11, 1977, defendants filed an "Affidavit of Extension of Time". On December 20, 1977, defendants filed the appropriate filing fee for appeal.

Bankruptcy Rule 802 sets forth the time for filing a notice of appeal from a judgment of the Bankruptcy Court. Bankruptcy Rule 802(a) states that a notice of appeal must be filed within ten days of the date of the entry of the judgment appealed from. Bankruptcy Rule 802(c) provides for extensions of time for filing a notice of appeal for a period not to exceed twenty days from the expiration of the ten day period provided by Bankruptcy Rule 802(a).

In this case, the Notice of Appeal

was filed twenty days after the entry of judgment and the Affidavit for Extension of Time, which could be treated as a request to extend the time pursuant to Bankruptcy Rule 802(c), was filed thirty-one days after the entry of judgment. It is inconsequential that the affidavit of extension of time was mailed less than thirty days after the entry of judgment. In re Benefiel, 500 F.2d 1219 (9th Cir. 1974).

Bankruptcy Rule 802(c) provides in part as follows:

> "A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property."

This language means that an appeal may be timely filed if a request is made to extend the time for filing a notice of appeal within thirty days of the entry of judgment. However, the clear intent of Rule 802 is that either the notice of appeal must be filed within ten days of the entry of judgment or a request to extend the time and a notice of appeal must be filed within thirty days of the entry of judgment. The explanatory comment on Rule 802 in the Collier Pamphlet Edition of the Bankruptcy Rules explains this requirement as follows:

> ". . . note particularly that under Subdivision (c) the referee may entertain a request for an extension of time made within 20 days after the initial 10 day period has expired. Such a request must be accompanied by a showing of excusable neglect and may not be

made if the order sought to be appealed authorizes the sale of property." Bankruptcy Act and Rules, 1976 Collier Pamphlet Edition, Part 2, p. 965 (Matthew Bender & Company, 1976).

Defendants filed their Affidavit of Extension of Time thirty-one days after the entry of judgment. Therefore, Bankruptcy Rule 802(c) offers no cure for the untimely notice of appeal. There is no jurisdiction for this appeal to go forward. Accordingly, defendants' appeal is dismissed.

IT IS SO ORDERED.

DATED this 23rd day of March, 1978.

/s/ Michard R. Hogan
BANKRUPTCY JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
SAM WILLIAM CHERNABAEFF and SALLY CHERNABAEFF,	)	Bankruptcy
	)	
	)	Nos.
Bankrupts,	)	77-01122
	)	77-01123
DAVID R. MOSS,	)	
	)	
Plaintiff,	)	
	)	JUDGMENT
vs.	)	
	)	
SAM WILLIAM CHERNABAEFF and SALLY CHERNABAEFF,	)	
	)	
Defendants.	)	

The opinion and order entered on the 23rd day of March, 1978, by Bankruptcy Judge Michael R. Hogan is affirmed.

/s/ Robert C. Belloni
The Honorable
Robert C. Belloni

APPENDIX K

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF KERN

DAVID R. MOSS,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
vs.	)	153856
	)	JUDGMENT
SAM W. CHERNABAEFF,et al,	)	
	)	
Defendants.	)	

This matter having come on regularly for hearing on the 13th day of February, 1979, the Honorable Gerald K. Davis, Judge, presiding; and the matter having been submitted to the court on the respective declarations; and good cause appearing;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is rendered on behalf of the plaintiff, DAVID R. MOSS, and against the defendants, SAM W. CHERNABAEFF and SALLY CHERNABAEFF, for the following amounts:

(1) Principal	$32,964.68
(2) Interest on said sum from June 3, 1978 to February 14, 1979	1,617.92
(3) Costs incurred in attempts to collect the original judgment	205.90
(4) Interest on the aforesaid costs from June 3, 1978 to February 14, 1979	10.24
(5) Costs of suit incurred herein	66.50
TOTAL	$34,865.24

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said amounts are predicated and based upon the prior Judgment in Kern County Superior Court Action No. 96993, and that said Judgment is reaffirmed in its entirety.

DATED: February 16, 1979.

/s/ Gerald K. Davis
JUDGE OF THE
SUPERIOR COURT